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In the Supreme Court of the United States

OCTOBER TERM, 1992

CALIFORNIA HOUSING SECURITIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government effected a compensable taking within the meaning of the Fifth Amendment when the Resolution Trust Corporation, having been appointed as conservator of a federally-insured thrift institution and acting pursuant to federal banking laws, took possession of the institution and assumed control over the operation of the institution's business.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 959 F.2d 955. The decision of the United States Claims Court (Pet. App. 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1992. On June 12, 1992, the Chief Justice extended the time to petition for a writ of certiorari to and including July 22, 1992. The petition for a writ of certiorari was filed on July 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner California Housing Securities, Inc. (CHS), became the sole shareholder of Saratoga Savings and Loan Association one year after Saratoga became a California-chartered thrift institution in 1983. In accordance with California law, Saratoga applied for and received federal deposit insurance from the Federal Savings and Loan Insurance Corporation (FSLIC). Pet. App. 1a-2a.

As one of the conditions for obtaining federal deposit insurance, Saratoga promised that it would "not carry on any sales plan or practices, or any advertising, in violation of regulations to be made by [FSLIC]." Pet. App. 2a; 12 U.S.C. 1726(b) (1988) (repealed by Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, Tit. IV, § 407, 103 Stat. 363). Under 12 U.S.C. 1729(c) (1988) (repealed by same section of FIRREA), federally-insured thrifts were also subject to the appointment of the FSLIC as a conservator or receiver by the Federal Home Loan Bank Board (FHLBB), under the criteria then set forth in 12 U.S.C. 1464(d) (amended by FIRREA, § 301(d), 103 Stat. 282).

2. In 1989, acting in response to a crisis in the savings and loan industry, Congress revised the regulatory framework governing the savings and loan industry by enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.[1] FIRREA abolished FSLIC and transferred

[1] Prior to 1989, the federally-insured savings and loan industry had been governed by three major statutes enacted in the 1930s: the Federal Home Loan Bank Act, ch. 522, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. 1421 *et seq.* (1988)); the Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128 (codified as amended

its functions to other agencies (Titles III and IV, 103 Stat. 277, 354); created the Savings Association Insurance Fund (SAIF) under Federal Deposit Insurance Corporation (FDIC) management to insure thrift institutions such as Saratoga (Title II, 103 Stat. 187);[2] abolished the FHLBB and established the Office of Thrift Supervision (OTS) in the Department of the Treasury, making it responsible for examination, supervision, and regulation of all federally insured savings associations and chartering of federal thrifts (§§ 301, 401, 103 Stat. 277, 354); and established the Resolution Trust Corporation (RTC), charged with resolving the cases of thrifts closed between January 1989 and August 1992 (§ 501, 103 Stat. 363).

The Director of OTS has been vested with many of the powers previously held by the FHLBB, including the power to appoint conservators and receivers. The Director is authorized to appoint a conservator or receiver for a federally-insured state savings association such as Saratoga if, in his opinion, one or more statutory grounds exist for the appointment. Those grounds, which are generally similar to the grounds for appointment of the FSLIC as a conservator or receiver under prior law, include "substantial dissipation of assets or earnings due to any violation or violations of law or regulations, or to any unsafe or unsound practice or practices." 12 U.S.C. 1464(d)(2)(C)(ii) (Supp. II 1990); cf. 12

at 12 U.S.C. 1461 *et seq.*); and (3) the National Housing Act, ch. 847, 48 Stat. 1246 (codified as amended at 12 U.S.C. 1701 *et seq.*).

[2] As a savings and loan association insured by the FSLIC on the day before the enactment of FIRREA, by operation of law Saratoga became a depository institution insured by the FDIC through the SAIF upon the enactment of FIRREA. 12 U.S.C. 1813(c)(2) (Supp. II 1990), 1814(a)(2) (Supp. II 1990).

U.S.C. 1464(d)(6)(A)(ii) (1988).[3] The RTC is authorized to merge a savings and loan association with another insured depository institution or transfer any asset or liability of the association. 12 U.S.C. 1441a(b)(4), 1821(d)(2)(G) (Supp. II 1990). If any funds remain after all claims and administrative expenses are paid, the RTC must distribute the funds to the association's shareholders. 12 U.S.C. 1821(d)(11)(B) (Supp. II 1990).

3. On November 8, 1989, OTS appointed the RTC as conservator for Saratoga. On the following day, the RTC entered and took possession of Saratoga's offices in California.[4] On May 24, 1990, OTS appointed the RTC as receiver for Saratoga. Thereafter, the RTC liquidated most of Saratoga's assets and liabilities. Pet. App. 4a.

4. CHS filed a complaint in the Claims Court on May 30, 1990, suing both individually and derivatively on behalf of Saratoga, alleging that the actions of OTS and the RTC constituted a taking of Saratoga's property for public use within the meaning of the Fifth Amendment to the United States Constitution. The Claims Court granted summary judgment in the government's favor, relying upon its reasoning in *American Continental Corp.* v. *United States*, 22 Cl. Ct. 692 (1991), which con-

[3] A savings association may file an action in a United States district court to challenge the appointment of a conservator or receiver within thirty days. 12 U.S.C. 1464(d)(2)(E) (Supp. II 1990). Otherwise, "no court may take any action for or toward the removal of any conservator or receiver or, except at the request of the Director, to restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. 1464(d)(2)(G) (Supp. II 1990).

[4] On December 8, 1989, Saratoga filed suit against the Director of OTS in the United States District Court for the District of Columbia (*Saratoga Savings & Loan Ass'n* v. *Ryan*, Civ. Action No. 89-3305 (TPJ)), pursuant to 12 U.S.C. 1464(d)(2)(E) (Supp. II 1990), challenging OTS's appointment of the RTC as conservator. That suit is pending.

cerned the liquidation of another thrift institution, the Claims Court held that the performance by the RTC and OTS of their regulatory functions in connection with the conservatorship and receivership was not a compensable taking within the meaning of the Fifth Amendment. *California Hous. Sec., Inc.* v. *United States*, No. 90-467C (Cl. Ct. Apr. 2, 1991). Pet. App. 4a-5a.

5. The Federal Circuit affirmed. Pet. App. 1a-11a. The court of appeals reasoned that the RTC's seizure of Saratoga and subsequent liquidation of Saratoga's assets was not a Fifth Amendment taking "because neither Saratoga nor CHS could have developed a historically rooted expectation of compensation for such a seizure." *Id.* at 7a.

ARGUMENT

CHS attempts to extend to conservatorships and receiverships the *per se* rule, stated by this Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982), that "a permanent physical occupation of property is a taking." Seizing upon the fact that the RTC has functioned as Saratoga's conservator and receiver through employees who have physically been on the institution's premises and physically handled Saratoga's files when managing Saratoga's affairs, CHS characterizes the implementation of the conservatorship and receivership as a "permanent physical occupation" of Saratoga by the government. Pet. 7-8.

The court of appeals correctly rejected petitioner's characterization. Neither *Loretto* nor the other cases cited by petitioner (Pet. 6-8) have applied the *per se* takings rule to circumstances remotely resembling those involved here, and none of those cases suggest that the *per se* rule should be extended as petitioners urge. Unlike any of those cases, the government obtained its right to seize petitioner's property — and protect the fed

eral insurance funds that were at risk in petitioner's continuing operations—when petitioner voluntarily applied for federal financial support for its operations through the federal deposit insurance system. In addition, unlike those cases, petitioner's property was not occupied solely for the use and benefit of the government; the conservator and receiver were appointed to protect petitioner's own assets.

1. a. This Court in *Loretto* explained the "traditional rule that a permanent physical occupation of property is a taking" by stating that "[i]n such a case, the property owner entertains a *historically rooted expectation* of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." 458 U.S. at 441 (emphasis added). The court of appeals here stressed that, unlike the property owner in *Loretto*, "neither Saratoga nor CHS could have developed a historically rooted expectation of compensation for such a seizure. Saratoga did not possess the most valued property right in the bundle of property rights, the right to exclusive possession, * * * at the time of the alleged taking in this case." Pet. App. 7a. This was so because "Saratoga voluntarily subjected itself to an expansive statutory regulatory system when it obtained federal deposit insurance." *Id.* at 8a. When it did so,

> Saratoga understood, with what may only be viewed as a historically rooted expectation, that the federal government would take possession of its premises and holdings as conservator or receiver if it substantially dissipated its "assets or earnings due to any violation or violations of law or regulations, or to any unsafe or unsound practice or practices[.]"

Ibid., quoting 12 U.S.C. 1464(d)(6)(A)(ii) (1988).

As the court of appeals concluded, the government's seizure "cannot be deemed a taking" because it arose out of Saratoga's "voluntary agreement" to obtain federal financial support under the federal deposit insurance program, an agreement from which Saratoga "benefitted for six years" prior to the seizure. Pet. App. 9a-10a. Under those circumstances, the rationale for the *per se* rule, as stated in *Loretto*, does not apply.

b. CHS argues that the court of appeals erred in considering Saratoga's historically rooted expectations. According to CHS, such expectations are a factor to be considered only in determining whether government *regulation* amounts to a taking. Pet. 9. This Court, however, has attributed far broader significance to property owners' historically rooted expectations than CHS admits. The emphasis of the court of appeals upon Saratoga's expectations is consistent with this Court's "'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

Even in the context of permanent physical occupation of land, the Court has recognized that a landowner's property rights may be limited by a pre-existing right of the government to occupy the land. Specifically referring to its earlier holding in *Loretto*, the Court has recently explained that it "assuredly *would* permit the government to assert [without compensation] a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. at 2900.

The government's occupation of Saratoga's premises is analogous to the occupation of land pursuant to a pre-existing easement. The statute authorizing the gov-

ernment to take control of a federally-insured savings and loan association, upon the occurrence of the statutory conditions for the appointment of a conservator or receiver, pre-existed the chartering of Saratoga as a savings and loan association. At the time Saratoga entered the savings and loan industry, the regulatory scheme specifically subjected federally-insured institutions' property to a governmental right to intrude under circumstances warranting a conservatorship or receivership. Saratoga entered the industry and obtained federal deposit insurance subject to that right.

As the court of appeals stated,

> Saratoga lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership on Saratoga. As a consequence of the regulated environment in which Saratoga voluntarily operated, Saratoga and CHS held less than the full bundle of property rights on which a *Loretto* expectation of compensation is founded.

Pet. App. 7a-8a. Saratoga's bundle of rights in its property was limited, from the time it applied for federal deposit insurance, by the government's right to occupy Saratoga's premises in accordance with the statute. That right, rather than the mere fact that Saratoga operated in a pervasively regulated industry, was the basis

of the court of appeals' conclusion that no taking had occurred here.[5]

c. CHS argues that the Federal Circuit erred in concluding that, as a condition of obtaining federal deposit insurance, Saratoga voluntarily agreed to an uncompensated seizure of its business under the circumstances described in the statute. First, CHS argues that no such condition was included in the list of conditions contained in 12 U.S.C. 1726(b) (1988). Pet. 12. The conditions listed in Section 1726(b), however, were specific undertakings to which thrifts were required to agree in their applications for deposit insurance. Being placed into conservatorship or receivership is not, of course, an action that the thrift promises to take, and did not logically belong in Section 1726(b). The fact that the government's right to seize a thrift is created by another statutory provision is therefore of no consequence.

Second, CHS argues that "[t]he statute authorizes the appointment of a conservator, but it nowhere states that the savings institution will not be compensated for the

[5] CHS exaggerates the potential impact of the court of appeals' reasoning, arguing that this reasoning "would allow regulations enacted after a business has already been in operation to vitiate its right to compensation on the theory that businesses operating in regulated industries are 'on notice that [they] might be subjected to different regulatory burdens over time.'" Pet. 10, quoting Pet. App. 9a. The passage in the court of appeals' opinion to which CHS refers does not justify CHS's alarm. The passage concerns the fact that, under FIRREA and related legislation, changes were made in the regulatory scheme governing the savings and loan industry after Saratoga obtained federal deposit insurance. As the court below noted, however, "[c]onservatorship and receivership under FIRREA differ from conservatorship and receivership under the predecessor statutes more procedurally than substantively." Pet. App. 9a. The changes in the regulatory scheme did not upset any prior expectations that Saratoga could legitimately have claimed.

value of its seized property." Pet. 12. That statutory silence does not support any expectation on the part of a thrift that it will receive compensation if a conservator is appointed.

Indeed, far from being historically rooted, such an expectation would be entirely contrary to precedent. Statutes authorizing bank regulatory agencies to appoint conservators or receivers for banks and thrifts have existed for many years. For example, for well over a century, the National Banking Act has provided that "whenever the [C]omptroller [of the Currency] shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs * * *, appoint a receiver, who shall proceed to close up such association." Act of June 30, 1876, ch. 156, § 1, 19 Stat. 63 (currently codified at 12 U.S.C. 191 (1988)). Yet, CHS cites no case—nor are we aware of any—in which a conservator's or receiver's seizure of a financial institution was treated as a compensable taking.

2. *Loretto* and the other cases cited by petitioner (Pet. 7-8) are inapposite for an additional reason, since there was no "physical occupation" of petitioner's property by the government, as that term was used in *Loretto* and the other cases relied upon by CHS. In *Loretto* and the other cases, the property was occupied for the use or benefit of the occupier. "In such a case, the property owner entertains a historically rooted expectation of compensation." *Loretto*, 458 U.S. at 441. Here, however, "the United States has taken nothing for its own use." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986). CHS does not allege that a conservator or receiver was appointed for any reason other than to protect Saratoga's assets, and the objective of protecting a thrift's assets is implicit in the statutory criteria for appointing a conservator or receiver. See 12 U.S.C. 1464(d)(2)(C) (1988).

Nor has the government in fact appropriated for its own use any of Saratoga's assets or the proceeds thereof. The statute does not empower the RTC to keep for its own use the proceeds of the sale of a thrift's assets. Rather, the statute states that where "funds remain after all depositors, creditors, other claimants, and administrative expenses are paid, the receiver shall distribute such funds to the depository institution's shareholders or members." 12 U.S.C. 1821(d)(11)(B) (Supp. II (1990). The government itself may be among those with claims to a portion of such proceeds and, pursuant to Section 1821(d)(11)(A) (Supp. II 1990), may retain that portion based upon such a claim. In no event, however, does the government appropriate for its own benefit proceeds to which it has no claim of entitlement. This case thus does not involve any "occupation" of Saratoga's property by the government, as the term "occupation" is used in *Loretto*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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